

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

3 Barry Lee Jones,) 4:01-cv-00592-TMB
4)
5 Petitioner,)
6)
7 vs.)
8) Tucson, Arizona
9 Charles L. Ryan, et al.,) November 3, 2017
10)
11 Respondents.)
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13 _____)
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BEFORE THE HONORABLE TIMOTHY M. BURGESS, DISTRICT JUDGE

Transcript of Proceedings
Evidentiary Hearing - Day 5 (P.M. Session)

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UNITED STATES DISTRICT COURT

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1 (On the record at 1:08 p.m.)

2 THE COURT: So I just wanted to let you know that
3 we're going to have to take a break a little before 2:00
4 because I've got a short hearing in Anchorage, trial prep, that
5 I need to meet with counsel on. So we'll probably break a
6 little before 2:00 until about 2:15.

7 MR. SANDMAN: We like breaks, especially after this
8 long week.

9 THE COURT: Okay.

10 MR. SANDMAN: Our next witness is Dan Cooper.

11 THE COURT: Sir, if you could please come forward.
12 Don't have a seat yet. If you could stand in the witness box
13 and be sworn in.

14 **DAN COOPER, WITNESS, SWORN**

15 **DIRECT EXAMINATION**

16 BY MR. SANDMAN:

17 Q. Would you state your name, please.

18 A. My name is Dan Cooper.

19 Q. Mr. Cooper, what is your occupation?

20 A. I am an attorney.

21 Q. Can you tell us when and from where you graduated from law
22 school?

23 A. Sure. I went to Arizona State and graduated in December of
24 1976 and took the bar in the spring of 1977.

25 Q. Can you sort of walk us through, in broad strokes, your

1 career and where you have worked and the sorts of things you've
2 been concentrating on as a lawyer?

3 A. When I graduated law school, I went to work for -- it's an
4 agency called Vista, which is the Volunteers in Service to
5 America, as an attorney, working for Legal Aid as an attorney
6 doing unemployment hearings.

7 I then, in 1978, moved to Window Rock, Arizona. I worked
8 for the Navajo Tribe as an attorney, trying cases off
9 reservation, in places like Flagstaff, Holbrook, Winslow, and
10 stayed there until the fall of 1979. And I moved to Tucson and
11 began to work at the Pima County Public Defender's Office in
12 November of 1979.

13 I stayed there until the -- I believe it was the middle of
14 1984, I moved to a private firm in Phoenix called Treon,
15 Warnicke & Raush. I stayed there about a year and a half and
16 then moved back to Tucson and went to the Public Defender's
17 Office, late 1985. And I stayed there until 1992, June, and
18 Laura Udall and I formed Cooper & Udall in June of '92, and
19 we've been together ever since.

20 Q. So it sounds like you started your criminal defense career
21 in 1979, when you started at the Pima County Public Defender's
22 Office?

23 A. No, actually it was when I was in Window Rock, I was
24 defending Navajos in criminal cases in Superior Courts off the
25 reservation.

1 Q. So it was a bit earlier than that.

2 After joining the Public Defender's Office in Pima County,
3 did you have a problem with a capital case shortly after
4 joining the office?

5 A. I did. In 1980, Don Harding killed two people in Tucson
6 and was arrested here. He had actually killed about five other
7 people across the country before he wound up in Tucson. I was
8 told to be second chair on the case, which was fine, until
9 about a year later the first chair quit the office and moved to
10 Phoenix. I was basically left with the case. At some point
11 prior to the trial, I advised Mr. Harding just to represent
12 himself and we'd see what happened down the road. I was
13 censured by the Supreme Court for not being candid with the
14 tribunal.

15 Q. That was around 1980?

16 A. Well, the murder was in '80, I think the trial was in '82,
17 and I think the end of the Supreme Court issue was in '84.

18 Q. And the relevant incident occurred about 1981 then?

19 A. The murder was in '80. The incident took place in '81,
20 correct.

21 Q. Over the course of your career as a criminal defense
22 lawyer, how many cases have you tried to a jury?

23 A. About 200.

24 Q. And how many murder cases have you tried to a jury in
25 Arizona?

1 A. Forty-one.

2 Q. And of those, how many -- well, not of those, but how many
3 capital cases have you handled either through trial or through
4 a plea?

5 A. Nine.

6 Q. What about felony child abuse cases, have you handled
7 appreciable numbers of felony child abuse cases?

8 A. I've had at least five where the baby died, and several
9 dozen others where I've represented people accused of various
10 types of child abuse.

11 Q. Earlier in these proceedings, were you asked to prepare a
12 chart indicating the number of murder cases that you had tried
13 prior to 1996?

14 A. Yes.

15 Q. Before Mr. Jones' -- Mr. Jones' case actually went to trial
16 in '95, but --

17 MR. SANDMAN: Your Honor, may I approach the witness?

18 THE COURT: Sure. Just as long as opposing counsel
19 knows what you're going to show him.

20 MR. SANDMAN: Yeah. They do. Thank you.

21 BY MR. SANDMAN:

22 Q. I'd like to show you what's marked as Exhibit 139B, as in
23 "boy." Can you identify what that is?

24 A. That's the chart I prepared of the trials, the murder
25 trials, that I did. Basically it was -- prior to '96, although

1 I added a March of '97 trial as well, I also added a third --
2 there are two child killing cases prior to '96, but I added the
3 third and only other child killing murder that I've done from
4 February of 2010.

5 Q. Does the chart reflect the case numbers and the outcome of
6 the cases?

7 A. It does.

8 Q. Whether there was an acquittal or a hung jury or a guilty
9 verdict?

10 A. Right.

11 Q. How many not guilty verdicts are on that list?

12 A. Do you want me to count them?

13 Q. Yeah.

14 A. Eleven.

15 Q. So you had 11 acquittals on murder cases tried before --

16 A. That's pretty good. Yeah.

17 Q. I want to show you, if I could --

18 MR. SANDMAN: Your Honor, may I show the witness
19 Exhibit 139C?

20 BY MR. SANDMAN:

21 Q. Can you identify that exhibit?

22 A. That's a chart of the capital cases that I have had all the
23 way to completion, whether by trial --

24 THE COURT: Capital case...? I'm sorry, you cut out
25 the last part.

1 THE WITNESS: I'm sorry. That I've had all the way to
2 completion.

3 BY MR. SANDMAN:

4 Q. You said there was a total of nine, how many death sentence
5 verdicts resulted from those nine cases?

6 A. Levi Jackson was sentenced to death. I did Shad
7 Armstrong's ring retrial, and he was sentenced to death.

8 Q. So there's two out of the nine?

9 A. That's correct, two.

10 Q. I want to go back to your experience in Pima County
11 beginning in 1979. I think you testified you were there from
12 '79 to '84 and then from '85 to '92. If we could sort of lump
13 those time periods together, because you were only gone for
14 about maybe less than a year. During the time that you worked
15 at the Pima County Public Defender's Office, was there a
16 recognition of professional norms that dictated that defense
17 counsel should conduct a prompt investigation of the
18 circumstances of the case and explore all avenues leading to
19 the facts relevant to the merits of the case?

20 A. Yes.

21 Q. And when you went into private practice in 1992, were those
22 norms firmly in place and recognized by the private sector
23 defense bar in Pima County?

24 A. Yes, they were.

25 Q. Over the course of your multi-decade career -- as long as

1 mine actually -- have you been a frequent attendee at criminal
2 defense seminars and training sessions in the State of Arizona?
3 Criminal defense seminars and trainings?

4 A. Both in the state and out of the state, yes.

5 Q. Are the investigative duties and professional norms related
6 to those duties routinely reinforced at those trainings?

7 A. They are.

8 Q. Do they correspond to the norms that you said were
9 controlling in Pima County at the Defender's Office and in
10 private sector?

11 A. Yes.

12 Q. Have you also been a frequent speaker at criminal defense
13 seminars and training sessions in Arizona and elsewhere?

14 A. In Arizona, yes.

15 Q. And same question: Have you lectured on topics relevant to
16 the importance of investigation in criminal defense work?

17 A. I have.

18 MR. SANDMAN: I want to, if I could, Your Honor,
19 approach the witness with Exhibit 13D.

20 BY MR. SANDMAN:

21 Q. Can you identify Exhibit 13D, please?

22 A. It's the American Bar Association Standards for Criminal
23 Justice.

24 Q. And if you could turn the page to Page 2. Can you tell us
25 what standard is indicated there at Page 2 of the exhibit?

1 A. Standard 4-4.1.

2 Q. Yes.

3 A. It's the duty to investigate.

4 Q. If we could just highlight just the top paragraph there.

5 THE COURT: I'm sorry, you said these standards are
6 from when?

7 MR. SANDMAN: Your Honor, these ABA Standards for
8 Criminal Justice were adopted, I believe, in 1993, which is
9 indicated -- there is a copyright notice actually on Page 2 of
10 the exhibit.

11 THE COURT: And it indicates 1993?

12 MR. SANDMAN: Yes, sir.

13 THE COURT: Thank you.

14 BY MR. SANDMAN:

15 Q. Focusing you on Standard 4-.41, what does that standard
16 provide in the first few sentences there?

17 A. It basically says that defense counsel need to explore all
18 avenues leading to facts relevant to the merits of the case and
19 the penalty in the event of conviction.

20 Q. Does that particular standard mirror the prevailing
21 professional norms, as you understood them, to be understood in
22 1994 and '95, in Pima County, Arizona?

23 A. They were.

24 Q. And way back to 1979?

25 A. Correct.

1 Q. I want to draw your attention to the last paragraph on that
2 page, at the beginning of the commentary, where it says: Facts
3 form the basis of effective representation.

4 A. Right.

5 Q. Could you expand at least on your understanding of what
6 that means?

7 A. There was an unwritten rule at the Public Defender's Office
8 that if you got a murder case, you had to be at the jail to see
9 the defendant within 24 hours. And the reason for that -- and
10 normally you would try to take one of the public defender
11 investigators with you. The reason for that was the importance
12 of investigating and getting started right away. Because by
13 the time the person's arrested, has been to court and has had
14 their initial appearance, typically the police have already
15 begun a pretty extensive investigation, so it's critical that
16 the defense and their investigation begin right away.

17 Q. And the notion that facts form the basis of effective
18 representation, does that continue until the case ends? Is
19 that ever a consideration that goes away?

20 A. You win or lose cases on the facts. It's just that simple.
21 It's the only thing I remember from law school. And it lasts
22 all the way through sentencing, if that happens. But
23 certainly, through the guilt phase, facts are what matter.

24 Q. And the next page --

25 THE COURT: Before you ask the next question, on this

1 last screen, and the screen before, there were interlineations
2 on the document. Are those yours, Mr. Cooper, or are those
3 somebody else's interlineations?

4 THE WITNESS: Those are mine.

5 THE COURT: Thank you.

6 MR. SANDMAN: Then at Page 2, if you could enlarge --
7 or the next page. I'm sorry, Jennifer. There you go. My
8 apologies. If you could enlarge the first paragraph there.

9 BY MR. SANDMAN:

10 Q. About six lines -- five lines down, do you see where it
11 says: The resources of scientific laboratories may be required
12 to evaluate certain kinds of evidence, analysis of fingerprints
13 or handwriting, clothing, hair, or blood samples or ballistics
14 tests may be necessary.

15 Do you find that? What's you're -- do you agree with that?

16 A. Well, especially -- yeah, outside of a confession, the most
17 compelling evidence there is in any case would be physical
18 evidence, whether it's fingerprints or blood evidence or
19 anything tying anybody to an offense, yeah, it's critical.

20 Q. And the final sentence of that paragraph states: Neglect
21 of any of these steps may preclude the presentation of an
22 effective defense. Can you comment on that?

23 A. Particularly -- well, when you -- when you begin a case,
24 you know that there are going to be speed bumps and there are
25 going to be issues and problems with the case or your client

1 wouldn't have been charged.

2 Particularly with physical evidence, you simply can't
3 ignore it. And sometimes physical evidence really doesn't mean
4 anything; oftentimes it does. But oftentimes it can be
5 interpreted different ways or it can be attacked in different
6 ways. And you have to do that, you simply can't ignore it.
7 And if you neglect it, more than likely it's to the detriment
8 of your client.

9 Q. Then on the following page, down at the bottom of the
10 second paragraph, are those your interlineations on the
11 document?

12 A. They are.

13 Q. And the last sentence indicates that the effectiveness of
14 advocacy is not to be measured solely by what the lawyer does
15 at trial. Without careful preparation, the lawyer cannot
16 fulfill the advocate's role. Failure to make adequate pretrial
17 investigation and preparation may also be grounds for finding
18 ineffective assistance of counsel.

19 In analyzing the prevailing professional norms, as you've
20 described them, is that a consideration?

21 A. I've always thought, and I thought it was obvious, the
22 pretrial investigation is the key to any case, and the most
23 important person to me when I represent an individual is my
24 investigator.

25 Q. Have you reviewed a considerable number of documents in

1 this case?

2 A. I have.

3 MR. SANDMAN: If I could approach again, Your Honor.

4 THE COURT: You may.

5 BY MR. SANDMAN:

6 Q. I'll show you what's marked as 139A.

7 THE COURT: I'm sorry, what was that?

8 THE WITNESS: 139A.

9 BY MR. SANDMAN:

10 Q. Can you identify what that is?

11 A. It's a list of items in this case that were sent to me to
12 review.

13 Q. Have you reviewed those documents?

14 A. Yes.

15 Q. Have you reviewed some of them many times?

16 A. Yes.

17 MR. SANDMAN: I'd offer Exhibit 139A.

18 THE COURT: 139A?

19 MR. SANDMAN: Yes.

20 THE COURT: Any objection?

21 MR. BRACCIO: These are the charts, Cary?

22 MR. SANDMAN: That's the chart of materials he
23 reviewed.

24 THE COURT: I've got D up on my screen.

25 MS. SCHNEIDER: That's an error.

1 MR. SANDMAN: Take that down.

2 MR. BRACCIO: We have no objection, Judge.

3 THE COURT: It's admitted. But for purposes of your
4 witness, I still have 139D up there. Is that what you
5 intended?

6 MR. SANDMAN: No.

7 THE COURT: Okay. I didn't think so.

8 MR. SANDMAN: And I apologize, but did I offer A
9 through C already?

10 THE COURT: No, you offered A.

11 MR. SANDMAN: I'm sorry. I'd like to offer B and C as
12 well.

13 THE COURT: Okay. So he's offering A, B, and C, any
14 objection? Counsel?

15 MR. BRACCIO: I'm sorry, Your Honor.

16 THE COURT: Any objection?

17 MR. SANDMAN: The charts and the statements.

18 MR. BRACCIO: No objection.

19 THE COURT: They're admitted. Go ahead.

20 BY MR. SANDMAN:

21 Q. Mr. Cooper, did you sign a declaration in this case?

22 A. Yes, I did.

23 Q. I believe that's Exhibit 139. Could we take a look at
24 that?

25 A. I have four different 139s.

1 Q. We're going to put up the original 139 in a moment.

2 MR. SANDMAN: That's the declaration.

3 MS. SCHNEIDER: You want the declaration?

4 MR. SANDMAN: Exhibit 139.

5 BY MR. SANDMAN:

6 Q. Do you recognize Exhibit 139 as being the declaration you
7 signed in this case?

8 A. Yes, I do.

9 MR. SANDMAN: Your Honor, I thought I had offered
10 139D, but if I didn't, I apologize.

11 THE COURT: I thought you did, too. So you are
12 offering A, B --

13 MR. SANDMAN: A, B, C, and D.

14 THE COURT: A, B, C, and D.

15 Any objection?

16 MR. SANDMAN: I thought we had, but someone sent me a
17 note saying I didn't.

18 THE COURT: Okay. Well, I thought you did, but....

19 MR. BRACCIO: Judge, I think we -- I think we launched
20 a prior objection to this document.

21 THE COURT: Which one? This one?

22 MR. BRACCIO: Correct. The declaration.

23 MR. SANDMAN: Your Honor --

24 MR. BRACCIO: This Court may have overruled that in
25 the order. And then it would just strike any testimony or any

1 statements that reflected the --

2 THE COURT: I think I indicated I am capable of making
3 the distinction.

4 MR. BRACCIO: Correct. Yeah.

5 THE COURT: So you don't have an objection?

6 MR. BRACCIO: No, Your Honor.

7 THE COURT: With that clarification?

8 MR. BRACCIO: Yeah.

9 THE COURT: So, admitted.

10 But you were circling around to D, but this is 139,
11 not D.

12 MR. SANDMAN: Right, D is the list of records. It's
13 pages of fine print of records he's reviewed.

14 THE COURT: So they're in -- it's in as well.

15 MR. SANDMAN: Right.

16 THE COURT: So, next question?

17 BY MR. SANDMAN:

18 Q. Mr. Cooper, in this declaration, did you ultimately express
19 some opinions about the type of investigation that should have
20 been done by Mr. Jones' lawyers, his trial lawyers?

21 A. Correct. Yes, I did.

22 Q. If you could look at the bottom of Page 4, starting in
23 Paragraph 8, and then we -- first of all, you conclude there
24 that forensic evidence played a critical role in Mr. Jones'
25 case. What do you mean? What are you saying there? What's

1 your understanding?

2 A. Well, this --

3 THE COURT: Let me stop you. You're not eliciting his
4 opinion as to whether or not -- he's not evaluating performance
5 of counsel below, right?

6 MR. SANDMAN: He is not going to comment on the
7 effectiveness of counsel, he is simply going to describe the
8 type of investigation that should have been done.

9 THE COURT: At that time.

10 MR. SANDMAN: At that time. Ultimately. I'm a couple
11 of questions away from that, but, yes.

12 THE COURT: But I want to make sure I know where we're
13 going with this.

14 MR. SANDMAN: Okay. But I've instructed the witness
15 not to express any opinion on the quality of the performance or
16 the effectiveness of counsel.

17 THE COURT: All right. Thank you. Go ahead.

18 BY MR. SANDMAN:

19 Q. But I just wanted to ask you briefly about your first
20 sentence in Paragraph 8, about the critical role that forensic
21 evidence played in Mr. Jones' case at trial.

22 A. Sure. This is a timeline case, and the state's entire
23 theory was that the murder took place during a specific period
24 of time, probably about a three-hour period of time, in which
25 Mr. Jones had custody of the child. And they also had a

1 specific cause of death, peritonitis, which means that the --
2 the way you would have to attack this case, defending it, is
3 somehow get Mr. Jones outside of that three-hour window, either
4 by showing that the injury didn't take place during that
5 three-hour period of time, and therefore he didn't do it, or
6 that somebody else did the injury, either way.

7 But, scientifically, you absolutely have to look at the
8 cause of death and determine whether or not that cause of death
9 could have happened in that window of time that the state was
10 alleging.

11 Q. Okay. I think you said you handled dozens of child abuse
12 cases, and is it often the case that there are no eyewitnesses
13 to child abuse cases?

14 A. My experience has been most often. I mean, there's usually
15 not an eyewitness to somebody beating a child.

16 Q. In those cases is it common, commonplace, for the
17 prosecution to attempt to tie the defendant to the offense by
18 tying the time of injury to the time that the child was in the
19 defendant's custody?

20 A. The state has to do that. They don't have a case if they
21 can't tie a defendant to a particular period of time.

22 Q. And what role does the state's medical evidence play in
23 that typical scenario?

24 A. Well, most of the prosecutors that I know rely on the
25 medical evidence, either from medical examiners or the

1 pediatricians involved. It's critical to most prosecutors.

2 Q. If you could expand just the first three lines of the top
3 of Page 5 there. Just the first three lines.

4 Then you conclude there that under prevailing professional
5 norms, an investigation of the time of injury should have been
6 the central focus of the defense.

7 Those are the professional norms we talked about earlier?

8 A. That's right.

9 Q. As applied to the facts of this case.

10 A. That's right. That's what this case was about, a window of
11 time where the state claimed Mr. Jones had the child and hurt
12 the child.

13 Q. And I think you're saying that that should have been done,
14 that type of investigation should have been done, are you
15 saying in the records you reviewed did you find evidence that
16 that type of investigation was done in this case?

17 A. No.

18 Q. I want to turn from the injuries, just for a moment, to
19 some questions about the prevailing standards for indigent
20 defense funding --

21 A. Sure.

22 Q. -- in Pima County in 1994, '95, and then later in 1999 to
23 2001. Or 2000. Excuse me.

24 Was there a statute in Arizona that regulated a Court's
25 discretion to grant indigent defense funding?

1 A. Yes, there was.

2 Q. We heard earlier from a witness that the Arizona Supreme
3 Court actually ordered the application of that statute in the
4 state post conviction case. Was that statute also applicable
5 in trial cases?

6 A. Yes, it was.

7 Q. Do you know what the standard -- what standard had to be
8 met in order to comply with that statute?

9 A. It's a reasonable, reasonable standard; looking at the
10 witness you're requesting, whether it be a reasonable request
11 based on the evidence.

12 Q. Do you have to set out specific reasons or can you just say
13 "I need an investigator," "I need an expert"?

14 A. I've never done it that way. Most judges in those days
15 wanted to know specifically why you were doing something, and
16 most of the judges wanted to know what are the facts that
17 you're basing this request upon.

18 Q. Focusing on the period '94/'95 through 2000.

19 A. Right.

20 Q. Were you handling a lot of court appointed cases during
21 that time period?

22 A. No, I was handling mostly retained cases. The court
23 appointed cases that we accepted were only murder cases.

24 Q. But you were handling, throughout that period, murder
25 cases? In the '90s through 2000?

1 A. Yeah. Yeah.

2 Q. And on an appointed basis, the murder cases.

3 A. Well, most were appointed. Every once in a while we had a
4 retained murder, but they were rare.

5 Q. Did you ever present an application for funding in Pima
6 County Superior Court that was denied?

7 A. Not that I remember. There might have been, but I don't
8 remember it ever happening.

9 Q. What would you have done in an instance where a court
10 denied funding?

11 A. I would have done one of two things. I would have decided
12 whether at that point I wanted to take a special action to
13 either the Court of Appeals or the Supreme Court.

14 Alternatively, I would have made an extensive fact-filled
15 record below for an appellate court to look at eventually.

16 Q. So the factual record would demonstrate the reasonable
17 necessity for the expert or investigator or what have you.

18 A. Right.

19 Q. Were you attending conferences, capital case conferences,
20 in the State of Arizona in -- throughout the '90s and into
21 early 2000s?

22 A. I was.

23 Q. On a frequent basis?

24 A. Yes.

25 Q. Did you ever attend a capital case conference in Arizona

1 where speakers were instructing people not to ask for funds in
2 post conviction cases in Arizona?

3 A. I've never heard that.

4 Q. Have you ever heard as a general proposition that there was
5 a culture in the Pima County Superior Courts to deny funding to
6 indigent defendants?

7 A. I had never heard that, no.

8 Q. Do you remember a case called *Ake vs. Oklahoma*?

9 A. *Ake vs. Oklahoma*? Yeah. Yeah, very well.

10 Q. Do you know about when that case was decided?

11 A. That case, I believe it was the late '80s, 1988 maybe.

12 Q. Did the Arizona Supreme Court ultimately, after *Ake* was
13 decided, adopt the *Ake* standard for the constitutional
14 right for indigents to get defense funding --

15 A. It was an Arizona Supreme Court case, I thought it was
16 *Knapp*, but I can't remember the name of the case that basically
17 adopts *Ake*, yes.

18 Q. Can you envision a scenario where the Arizona appellate
19 courts would have tolerated a wholesale denial of funding in
20 any type of capital case at any stage?

21 A. I can't envision that. And, frankly, the trial court and
22 the judges in Pima County, you know, some of them were more
23 sensitive than others, but they were very sensitive,
24 particularly to murder cases and death penalty cases, about the
25 need for adequate and effective representation. So they, every

1 once in a while, would question you about why you need that
2 kind of money, but there wasn't that much difficulty getting
3 it.

4 Q. Have you ever worked with an expert by the name of Phillip
5 Keen?

6 A. Dr. Keen?

7 Q. Yes. On an appointed case?

8 A. Yes.

9 Q. Were you able to get funding for him, too?

10 A. I received funding for Dr. Keen, I have.

11 Q. And I wanted to ask you, have you ever worked with an
12 expert by the name of Dr. Phillip Esplin, who is an expert in
13 child interviewing techniques?

14 A. Yes, I have.

15 Q. And have you sought funding to have Dr. Esplin appointed in
16 indigent defense cases that you handled in Pima County Superior
17 Court?

18 A. Yes.

19 Q. And how far back in time were you working with Dr. Esplin
20 in Pima County on indigent appointed cases?

21 A. I know I knew of Dr. Esplin in about 1990 -- or 1988 or
22 '89, when a friend of mine, a defense attorney here in Tucson,
23 was using him, and I probably had Dr. Esplin on a case maybe a
24 year or two after that. So it would have been in the early
25 '90s.

1 Q. Were those cases where you thought that the jury might need
2 some assistance in understanding potential issues in connection
3 with interviews of young children?

4 A. Yes.

5 Q. I want to turn your attention back to your declaration, at
6 Page 6, in the middle paragraph there. I guess that's
7 Paragraph 10.

8 We've talked a little bit about the -- earlier about the
9 time of injury. We were talking about the fatal injury to the
10 small bowel earlier, about the need to investigate that.

11 A. Right.

12 Q. And in this paragraph, what did you find with respect to
13 the need for investigation of the balance of the prosecution's
14 forensic evidence?

15 A. The medical examiner in this case tied the other injuries
16 to the injury to the bowel. It's absolutely critical,
17 particularly blood, you have blood in Mr. Jones' van that has
18 to be addressed. All of -- the bruises and the vaginal
19 injuries and the blood can all be addressed, and you really
20 can't defend it without doing that.

21 Q. Given the record that you reviewed, you know, in connection
22 with the blood in the van, was there anything that caught your
23 attention that suggested a critical need for investigation of
24 the bloodstain interpretation evidence?

25 A. Yeah, the -- there were witnesses who said they saw

1 Mr. Jones with the child on May 1st in the van, and the state's
2 claim was that's where the beating and the sexual assault took
3 place. And there was a minimal drop of blood in the front
4 seat, and that drop of blood had to be addressed, how it got
5 there. There were alternatives that -- clearly alternatives,
6 but you had to address those.

7 Q. That, I guess, brings us to the two child eyewitnesses.
8 Have you reviewed their statements in interview and at trial?

9 A. Yes.

10 Q. Did that raise any flags for you, in terms of the need for
11 investigation?

12 A. In two ways. First would be basically eyewitness
13 identification, and second would be the size of the van.

14 I'm sorry. And actually a third way would be -- well, just
15 the two ways: The size of the van and the perception of the
16 children. And, I'm sorry, the third way would be how the
17 children were questioned. And that would be a Dr. Esplin type
18 of issue, whether they were contaminated, whether their
19 statements were consistent, that sort of thing.

20 Q. Okay. Did you see any evidence that the trial counsel had
21 investigated those areas?

22 A. No.

23 MR. BRACCIO: Judge, I am going to object to this line
24 of questioning. I think this goes directly to the Court's
25 previous order.

1 THE COURT: Sustained.

2 BY MR. SANDMAN:

3 Q. What type of investigation of the physical evidence do you
4 think should have been done in respect to the size of the van
5 and so on?

6 MR. BRACCIO: Objection.

7 MR. SANDMAN: Can I be heard, Judge?

8 THE COURT: Yes.

9 MR. SANDMAN: I am not asking him to comment on
10 whether the performance was good or bad or effective, I am just
11 saying -- he's testified all along about the type of
12 investigation that should have been done, which comes within --

13 THE COURT: He can testify about the nature of the
14 investigation that would be the prevailing standard at the
15 time, but, I mean, there's a line he can't cross, which is
16 evaluating whether or not the investigation that was done in
17 this case was appropriate.

18 MR. SANDMAN: Right. And I didn't ask him that.

19 THE COURT: Okay. Go ahead.

20 BY MR. SANDMAN:

21 Q. Under prevailing norms in '94 and '95, what is the nature
22 of the investigation that should have been done? Without
23 commenting on your view of the performance. Just under
24 prevailing professional norms at that time, what type of
25 investigation should have been --

1 THE COURT: I don't think you can frame it as what
2 should have been done. If you frame it as what investigation
3 would you have done --

4 MR. SANDMAN: I'm sorry.

5 THE COURT: -- at that time of this situation.

6 You know, why Mr. Braccio keeps standing up is because
7 you're framing it as focused on this particular investigation,
8 which is getting awfully close to the line about what I said
9 you can't --

10 MR. SANDMAN: Okay. And I don't want to go over the
11 line, believe me.

12 THE COURT: Go ahead.

13 MR. SANDMAN: I appreciate the help.

14 BY MR. SANDMAN:

15 Q. What type of investigation would you have done under
16 professional prevailing norms with respect to the eyewitness
17 testimony? Let's focus first --

18 THE COURT: Again, just to complicate matters a little
19 bit more. So, you know, it's not obviously fair to have you
20 evaluate it in terms of where we are today --

21 MR. SANDMAN: Sure.

22 THE COURT: -- which are techniques and forensic
23 evidence. It's really, if you can, put yourself in the frame
24 of mind of '94/'95 and the standards that were prevailing at
25 that time and if you were faced with this situation, you know,

1 what would the standard be, what would people do.

2 MR. SANDMAN: Sure.

3 THE WITNESS: I can do that.

4 THE COURT: Go ahead.

5 THE WITNESS: There were two main areas that I think I
6 would have done that I think were critical here, and obviously
7 the first area is the children. And by this point, in 1995, I
8 had already used Dr. Esplin, and I knew about his expertise.
9 And most defense lawyers in the country by this point knew
10 about the McMartin case and knew about the perils of
11 interviewing children and how it had to be done and how it
12 could be really dangerous if not done correctly.

13 So one of the first things I would have done was
14 looked at the interviews of the kids, looked at what their
15 mother said about the interviews, and I would have consulted,
16 if not Dr. Golden (phonetic), there was another expert to
17 Dr. Goldman (phonetic) -- not Dr. Goldman -- that Dr. Esplin
18 actually referred me to named "Golden," at the University of
19 Utah, and I would have consulted with them immediately about
20 the questioning and the accuracy and the expertise of the
21 questioner of the children to determine how accurate or
22 inaccurate or how much a trier of fact could rely on what the
23 children said.

24 The second thing I would have done was, looking at the
25 van, I would have -- I would have wanted to have some kind of

1 expertise, some expert, as to the measurements of the van and
2 the vantage point of the person who was viewing what they said
3 they saw in the van and whether it was physically possible.

4 And actually during that period of time, I had a case
5 where I had to do something similar. Unfortunately, it didn't
6 work out real well. But you still have to contact the expert
7 and try to determine whether or not what the witness says they
8 saw would be possible under the physical conditions.

9 BY MR. SANDMAN:

10 Q. What kind of expert would you have consulted with back in
11 1995 about that issue?

12 A. Well, probably at that time, possibly an accident
13 reconstruction person. You know, somebody with the ability to
14 look at vehicles and take measurements and look at angles of
15 vehicles. There were several types of people in those days
16 that you could use. Accident reconstruction would be one. And
17 certainly most investigators had some ability to take
18 measurements of where the child would be versus the angle of
19 the vehicle.

20 Q. I want to turn your attention to Paragraph 12. You don't
21 really have to enlarge it. Just sort of a general question
22 about, do you remember reading different statements that Becky
23 Lux gave?

24 A. I do.

25 Q. What do you remember about the series of statements that

1 she made about Mr. Jones and Rachel on Sunday, May 1st?

2 A. I know that Rebecca had made three prior pretrial
3 statements saying that Mr. Jones had left with the child on two
4 different occasions, and had returned each time and the child
5 was fine. And I know that in the Gray trial that Rebecca had
6 basically said the same thing, that there were two different
7 trips, that on the return of the second trip the child was
8 fine. I know that when she testified in Mr. Jones' trial,
9 there was a third trip, and she indicated she did not see --
10 see them when they returned from the third trip.

11 Q. And how did that third trip factor into the prosecution's
12 case at Mr. Jones' trial?

13 A. It was devastating. It left you -- the testimony that
14 there were only two trips and that the child was fine --

15 MR. BRACCIO: Your Honor, I am just going to continue
16 to object to this.

17 THE COURT: Sustained. You're having him evaluate --

18 MR. SANDMAN: Okay.

19 THE COURT: -- not in this case, as opposed to what he
20 would do in this case, and that's a major distinction.

21 MR. SANDMAN: Yeah, I'm sorry.

22 THE COURT: We've reached a point where I am going to
23 need to take a break to have this other hearing. We're going
24 to break until 2:15. Thank you, very much.

25 (A recess was taken from 1:53 p.m. to 2:40 p.m.)

1 THE COURT: My apologies. I thought it was going to
2 be 15 minutes, and it wasn't.

3 So were you done on direct?

4 MR. SANDMAN: I've decided to be done, yes, Your
5 Honor.

6 THE COURT: I'm going to have to take longer recesses.

7 MR. BRACCIO: We work it out, Your Honor.

8 THE COURT: Go ahead.

9 CROSS-EXAMINATION

10 BY MR. BRACCIO:

11 Q. Good afternoon, Mr. Cooper.

12 A. Hi.

13 Q. How much have you billed in this case so far? Do you
14 recall?

15 A. I know that I haven't received a check yet.

16 THE COURT: I don't think the question was money
17 received, I think it's --

18 MR. BRACCIO: Yeah.

19 A. I believe 40 hours previously. And then this new cycle, I
20 think there's another, probably, 25 hours.

21 BY MR. BRACCIO:

22 Q. Okay. At about how much an hour?

23 A. 190.

24 Q. 190 an hour.

25 A. Yeah.

1 Q. By 1996, you had only tried one capital case to a verdict.

2 A. That's correct.

3 Q. That was the Jackson case?

4 A. Levi Jackson, right.

5 Q. You are not a certified criminal law expert, correct?

6 A. That's correct.

7 Q. And you recall, at the time of Barry Jones' trial, Sean
8 Bruner was?

9 A. I didn't know that, I've been told that.

10 THE COURT: I'm sorry. Maybe you can -- or can you
11 just explain to us what a certified criminal law expert is?

12 THE WITNESS: Sure. The state bar offers a
13 certification in various areas of law, and it requires, I
14 think, testing, and you just get certified. They do it in like
15 real estate and trusts, personal injury, criminal, different
16 areas of law.

17 THE COURT: So criminal defense is one area of
18 certification?

19 THE WITNESS: That's correct.

20 THE COURT: And were you, at the time, certified?

21 THE WITNESS: I have never been.

22 THE COURT: So, even now?

23 THE WITNESS: No. I never applied, I never took the
24 test. No.

25 BY MR. BRACCIO:

1 Q. And my next question actually was to the standard for that.
2 You agree that it's defined as a board certified specialist is
3 a lawyer who has demonstrated superior knowledge, skill,
4 integrity, professionalism, and competent in a specific area of
5 law, correct?

6 A. Yeah.

7 Q. You have never handled any post conviction relief
8 proceedings?

9 A. That's not true.

10 Q. So the one that you're doing?

11 A. That's right.

12 Q. So just that one that you're currently involved with.

13 A. Correct.

14 Q. Regarding your declaration in this case, you did not write
15 that, correct?

16 A. That's correct.

17 Q. Your understanding -- Mr. Sandman drafted that declaration
18 for you?

19 A. That's correct.

20 MR. BRACCIO: I have no further questions, Your Honor.

21 Thank you.

22 EXAMINATION BY THE COURT

23 Q. So I'm assuming you read the declaration before you signed
24 it.

25 A. I did, Your Honor.

1 Q. And you agree, even though it was written by Mr. Sandman,
2 you agree with the contents of the declaration that you signed?

3 A. I agreed with all of the contents.

4 THE COURT: Okay. Thank you.

5 Does that generate any additional questions for this
6 witness?

7 MR. BRACCIO: No, Your Honor.

8 MR. SANDMAN: No, sir.

9 THE COURT: Well, you know, I am sorry, I would have
10 finished up had I known it was going to be this short.

11 All right, sir. You may step down. We appreciate it.

12 MR. COOPER: Thank you.

13 THE COURT: Any other witnesses today?

14 MR. SANDMAN: No, Your Honor.

15 THE COURT: All right. So we are set for Monday. Can
16 you give me the game plan for Monday?

17 MR. BRACCIO: Absolutely, Your Honor. Cary and I will
18 discuss whether or not -- who's going to call her, but Sonia
19 Pesquiera will be the first witness Monday morning. We'll see
20 how far she gets. And then we have Dr. Howard flying in
21 Tuesday at noon. I'll pick him up and we'll come straight here
22 and we can start his testimony at 1:00 o'clock. And we will be
23 finished by Tuesday at the end of business.

24 THE COURT: So we're going to have the detective all
25 of Monday?

1 MR. BRACCIO: I think that's just going to depend on
2 how much --

3 THE COURT: I mean, she's available all Monday.

4 MR. BRACCIO: Correct.

5 THE COURT: You just don't know how many questions
6 y'all are going to have.

7 MR. BRACCIO: That's correct.

8 MR. SANDMAN: I think I have, you know, maybe 40
9 minutes, give or take.

10 MR. BRACCIO: Yeah, mine won't be terribly long. An
11 hour.

12 THE COURT: And then that's it for Monday. And then
13 on Tuesday Dr. Howard comes in at 1:00?

14 MR. BRACCIO: At noon, and then he'll be here -- we'll
15 drive straight here. He should be available by 1:00.

16 THE COURT: And he's the last witness.

17 MR. BRACCIO: Correct.

18 MR. SANDMAN: I was just thinking, if Mr. Braccio only
19 has an hour and a half or so, and I only have maybe 45 minutes,
20 maybe we could just do it Tuesday morning, do everything in one
21 day.

22 MR. BRACCIO: If Your Honor --

23 THE COURT: That's fine with me if -- as long as
24 you -- I mean, again, we have Tuesday then. As long as we can
25 finish on Tuesday and you're both confident we can finish on

1 Tuesday --

2 MR. SANDMAN: Maybe we should just do it on Monday
3 then. I don't want to -- that's too much for us in one day.

4 THE COURT: Wait. Wait. I am not generating the
5 stress, am I?

6 MR. SANDMAN: No, this is all internalized, believe
7 me.

8 THE COURT: Good answer.

9 So we'll just go ahead with Detective...

10 MR. BRACCIO: Detective Pesquiera.

11 THE COURT: ...Pesquiera on Monday.

12 MR. BRACCIO: Correct.

13 THE COURT: However long that takes, and then we'll
14 start on Tuesday afternoon with Dr. Howard.

15 MR. BRACCIO: Right. And I think, Your Honor, we
16 could take Detective Pesquiera in either the morning or the
17 afternoon and still have plenty of time.

18 THE COURT: So would you prefer to start with her
19 after lunch on Monday?

20 MR. SANDMAN: That sounds good to me.

21 MR. BRACCIO: That would give us sufficient time.

22 THE COURT: Okay. So we'll start at 1:00 o'clock on
23 Monday.

24 MR. BRACCIO: Okay.

25 MR. SANDMAN: That's great.

1 MR. COOPER: Without getting in trouble, I took the
2 exhibits. Sorry. (Handing exhibits to the clerk.)

3 THE COURT: All right. Anything else today?

4 MR. BRACCIO: No, Your Honor.

5 MS. SMITH: No, Your Honor.

6 THE COURT: Thank you, very much, then. We'll be in
7 recess.

8 (Off the record at 2:46 p.m.)

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C E R T I F I C A T E

I, A. TRACY JAMIESON, do hereby certify that I am duly appointed and qualified to act as an Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true and accurate transcript of the proceedings contained herein, held in the above-entitled cause on the date specified therein, and that said transcript was prepared by me.

Signed in Tucson, Arizona, on the 29th day of November, 2017.

s/A. Tracy Jamieson
A. Tracy Jamieson, RDR, CRR